

Senate Bill No. 757**CHAPTER 376**

An act to amend Section 22952 of, and to add Section 22962 to, the Business and Professions Code, to amend Section 118950 of the Health and Safety Code, and to amend Section 308 of, and to add Section 308.3 to, the Penal Code, relating to tobacco products.

[Approved by Governor September 28, 2001. Filed with Secretary of State October 1, 2001.]

LEGISLATIVE COUNSEL'S DIGEST

SB 757, Ortiz. Tobacco control.

Existing law vests with the State Department of Health Services primary responsibility for enforcement of tobacco control laws, and requires the department to conduct random onsite inspections at retail sites and to enlist the assistance of persons under the age of 18 in conducting the enforcement activities.

This bill would authorize the department to conduct onsite sting inspections in response to public complaints regarding the sale of tobacco products to minors or at retail locations where previous violations have occurred. This bill would also authorize the department to investigate illegal sales of tobacco products to minors by telephone, mail, or the Internet.

This bill would also provide that a peace officer is required to identify to the seller the identity of the person under 18 years of age who engaged in the sale of tobacco products. This bill would also require the department to notify the retail establishment of the inspection following an attempted sale.

Under existing law, it is unlawful to sell tobacco products from a vending machine or appliance except vending machines located at least 15 feet from the entrance of a public premise licensed to sell alcohol. This bill would make it unlawful for any person engaged in the retail sale of tobacco products to sell, offer for sale, or display cigarettes by self-service display, as defined, except in specified circumstances, and would impose civil penalties for violation of this prohibition. It would authorize the Attorney General, a city attorney, a county counsel, or a district attorney to bring a civil action to enforce this provision.

Under existing law, it is unlawful for any person, agent, or employee of a person in the business of selling or distributing smokeless tobacco or cigarettes to engage in the nonsale distribution of tobacco in certain public areas, as defined.

Ch. 376 —2—

This bill would include within the prohibition the nonsale distribution of smokeless tobacco or cigarettes on any private property that is open to the public, except as specified.

Existing law provides that every person, firm, or corporation that knowingly sells, gives, or in any way furnishes to another person under 18 years of age, any tobacco or prescribed tobacco-related product, is subject to either a criminal action for a misdemeanor or to a civil action to be brought by a city attorney, a county counsel, or a district attorney. This bill would make a person, firm, or corporation who knowingly, or under circumstances in which it has knowledge, or should have had

knowledge of the person's minority age, subject to criminal prosecution. By expanding the scope of existing crimes, thus imposing new duties upon local agencies, this bill would impose a state-mandated local program.

Existing law imposes an infraction on a person who sells cigarettes that are not contained in a sealed and properly labeled package, as defined.

This bill would impose an infraction or civil penalty for the manufacturing, distribution, sale, or offering of a package of cigarettes that does not contain at least 20 cigarettes or a package of roll-your-own tobacco that does not contain at least 0.60 ounces of tobacco. Because this bill would create a new infraction, thus imposing new duties upon local agencies, the bill would constitute a state-mandated local program. The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

The people of the State of California do enact as follows:

SECTION 1. Section 22952 of the Business and Professions Code is amended to read:

22952. On or before July 1, 1995, the State Department of Health Services shall do all of the following:

- (a) Establish and develop a program to reduce the availability of tobacco products to persons under 18 years of age through the enforcement activities authorized by this division.
- (b) Establish requirements that retailers of tobacco products post conspicuously, at each point of purchase, a notice stating that selling tobacco products to anyone under 18 years of age is illegal and subject to penalties. The notice shall also state that the law requires that all

—3— Ch. 376

94

persons selling tobacco products check the identification of any purchaser of tobacco products who reasonably appears to be under 18 years of age. The warning signs shall include a toll-free telephone number to the state department for persons to report unlawful sales of tobacco products to minors.

- (c) Provide that primary responsibility for enforcement of this division shall be with the state department. In carrying out its enforcement responsibilities, the state department shall conduct random, onsite sting inspections at retail sites and shall enlist the assistance of persons that are 15 and 16 years of age in conducting these enforcement activities. The state department may conduct onsite sting inspections in response to public complaints or at retail sites where violations have previously occurred, and investigate illegal sales of tobacco products to minors by telephone, mail, or the Internet.

Participation in these enforcement activities by a person under 18 years of age shall not constitute a violation of subdivision (b) of Section 308 of the Penal Code for the person under 18 years of age, and the person under 18 years of age is immune from prosecution thereunder, or under

any other provision of law prohibiting the purchase of these products by a person under 18 years of age.

(d) In accordance with Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code, the state department shall adopt and publish guidelines for the use of persons under 18 years of age in inspections conducted pursuant to subdivision (c) that shall include, but not be limited to, all of the following:

(1) The state department and any local law enforcement agency under an enforcement delegation contract with the department may use persons under 18 years of age who are 15 or 16 years of age in random inspections to determine if sales of cigarettes or other tobacco products are being made to persons under 18 years of age.

(2) A photograph or video recording of the person under 18 years of age shall be taken prior to each inspection or shift of inspections and retained by the department or the local law enforcement agency under an enforcement delegation contract with the department for purposes of verifying appearances.

(3) The state department or a local law enforcement agency under an enforcement delegation contract with the department may use video recording equipment when conducting the inspections to record and document illegal sales or attempted sales.

(4) The person under 18 years of age, if questioned about his or her age, need not state his or her actual age but shall present a true and correct identification if verbally asked to present it. Any failure on the part of the person under 18 years of age to provide true and correct

Ch. 376 —4—

94

identification, if verbally asked for it, shall be a defense to any action pursuant to this section.

(5) The person under 18 years of age shall be under the supervision of a regularly employed peace officer during the inspection.

(6) All persons under 18 years of age used in this manner by the department or a local law enforcement agency under an enforcement delegation contract with the department shall display the appearance of a person under 18 years of age. It shall be a defense to any action under this division that the person's appearance was not that which could be generally expected of a person under 18 years of age, under the actual circumstances presented to the seller of the cigarettes or other tobacco products at the time of the alleged offense.

(7) Following the completion of the sale, the peace officer accompanying the person under 18 years of age shall reenter the retail establishment and inform the seller of the random inspection and following an attempted sale, the department shall notify the retail establishment of the inspection.

(8) Failure to comply with the procedures set forth in this subdivision shall be a defense to any action brought pursuant to this section.

(e) Be responsible for ensuring and reporting the state's compliance with Section 1926 of Title XIX of the federal Public Health Service Act (42 U.S.C. 300x-26) and any implementing regulations adopted in relation thereto by the United States Department of Health and Human Services. A copy of this report shall be made available to the Governor

and the Legislature.

(f) Provide that any civil penalties imposed pursuant to Section 22958 shall be enforced against the owner or owners of the retail business and not the employees of the business.

SEC. 2. Section 22962 is added to the Business and Professions Code, to read:

22962. (a) For purposes of this section, “self-service display” means the open display of tobacco products in a manner that is accessible to the general public without the assistance of the retailer or employee of the retailer.

(b) Except as permitted in subdivision (b) of Section 22960, it is unlawful for any person engaged in the retail sale of tobacco products to sell, offer for sale, or display for sale cigarettes by self-service display. Any person who violates this section is subject to those civil penalties specified in the schedule in subdivision (a) of Section 22958.

(c) The Attorney General, a city attorney, a county counsel, or a district attorney may bring a civil action to enforce this section.

(d) This section does not preempt or otherwise prohibit the adoption of a local standard that imposes greater restrictions on the access to

—5— Ch. 376

94

tobacco products than the restrictions imposed by this section. To the extent that there is an inconsistency between this section and a local standard that imposes greater restrictions on the access to tobacco products, the greater restriction on the access to tobacco products in the local standard shall prevail.

SEC. 3. Section 118950 of the Health and Safety Code is amended to read:

118950. (a) The Legislature hereby finds and declares the following:

(1) Smoking is the single most important source of preventable disease and premature death in California.

(2) Smoking is responsible for one-quarter of all death caused by fire.

(3) Tobacco-related disease places a tremendous financial burden upon the persons with the disease, their families, the health care delivery system, and society as a whole.

(4) Despite laws in at least 44 states prohibiting the sale of tobacco products to minors, each day 3,000 children start using tobacco products in this nation. Children under the age of 18 years consume 947 million packages of cigarettes in this country yearly.

(5) The earlier a child begins to use tobacco products, the more likely it is that the child will be unable to quit.

(6) More than 60 percent of all smokers begin smoking by the age of 14 years, and 90 percent begin by the age of 19 years.

(7) Use of smokeless tobacco products among minors in this state is increasing.

(8) Smokeless tobacco or chewing tobacco is harmful to the health of individuals and may cause gum disease, mouth or oral cancers, increased tooth decay and leukoplakia.

(9) Tobacco product advertising and promotion are an important cause of tobacco use among children. More money is spent advertising

and promoting tobacco products than any other consumer product.

(10) Distribution of tobacco product samples and coupons is a recognized source by which minors obtain tobacco products, beginning the addiction process.

(11) It is the intent of the Legislature that keeping children from beginning to use tobacco products in any form and encouraging all persons to quit tobacco use shall be among the highest priorities in disease prevention for the State of California.

(b) It is unlawful for any person, agent, or employee of a person in the business of selling or distributing smokeless tobacco or cigarettes from engaging in the nonsale distribution of any smokeless tobacco or cigarettes to any person in any public building, park or playground, or

Ch. 376 —6—

94

on any public sidewalk, street, or other public grounds, or on any private property that is open to the general public.

(c) For purposes of this section:

(1) “Nonsale distribution” means to give smokeless tobacco or cigarettes to the general public at no cost, or at nominal cost, or to give coupons, coupon offers, or rebate offers for smokeless tobacco or cigarettes to the general public at no cost or at nominal cost. Distribution of tobacco products, coupons, coupon offers, or rebate offers in connection with the sale of another item, including tobacco products, cigarette lighters, magazines, or newspapers shall not constitute nonsale distribution.

(2) “Smokeless tobacco” means (A) a loose or flat, compressed cake form of tobacco that may be chewed or held in the mouth or (B) a shredded, powdered, or pulverized form of tobacco that may be inhaled through the nostrils, chewed, or held in the mouth.

(3) “Public building, park, playground, sidewalk, street, or other public grounds” means any structure or outdoor area that is owned, operated, or maintained by any public entity, including, but not limited to: city and county streets and sidewalks, parade grounds, fair grounds, public transportation facilities and terminals, public reception areas, public health facilities, public recreational facilities, and public office buildings.

(4) “Private property that is open to the general public” means any structure or outdoor area that is owned, operated, or maintained by any private entity and that is open for entry or use by the general public, whether or not a fee or charge is imposed for entry or use.

(d) Any person who violates this section shall be liable for a civil penalty of not less than two hundred dollars (\$200) for one act, five hundred dollars (\$500) for two acts, and one thousand dollars (\$1,000) for each subsequent act constituting a violation. Each distribution of a single package, coupon, coupon offer, or rebate offer to an individual member of the general public in violation of this section shall be considered a separate violation.

(e) Neither this section nor any other provision of law shall invalidate an ordinance of, or prohibit the adoption of an ordinance by, a city or county regulating distribution of smokeless tobacco or cigarette samples within its boundaries that is more restrictive than this section. An

ordinance that imposes greater restrictions on the sale or distribution of tobacco than this section shall govern, to the extent of any inconsistency between it and this section.

(f) This section does not apply to any public building, park, playground, sidewalk, street, or other public grounds, or any private property that is open to the general public where minors are prohibited

—7— Ch. 376

94

by law. This section also shall not apply to any public building, park, playground, sidewalk, street, or other public grounds open to the general public and leased for private functions where minors are denied access by a peace officer or licensed security guard on the premises.

(g) This section does not apply to any private property that is open to the general public where minors are denied access to a separate nonsale distribution area by a peace officer or licensed security guard stationed at the entrance of the separate nonsale distribution area and the separate nonsale distribution area is enclosed so as to prevent persons outside the separate nonsale distribution area from seeing the nonsale distribution unless they undertake unreasonable efforts to see inside the area.

SEC. 4. Section 308 of the Penal Code is amended to read:

308. (a) Every person, firm, or corporation which knowingly or under circumstances in which it has knowledge, or should otherwise have grounds for knowledge, sells, gives, or in any way furnishes to another person who is under the age of 18 years any tobacco, cigarette, or cigarette papers, or any other preparation of tobacco, or any other instrument or paraphernalia that is designed for the smoking or ingestion of tobacco, products prepared from tobacco, or any controlled substance, is subject to either a criminal action for a misdemeanor or to a civil action brought by a city attorney, a county counsel, or a district attorney, punishable by a fine of two hundred dollars (\$200) for the first offense, five hundred dollars (\$500) for the second offense, and one thousand dollars (\$1,000) for the third offense.

Notwithstanding Section 1464 or any other provision of law, 25 percent of each civil and criminal penalty collected pursuant to this subdivision shall be paid to the office of the city attorney, county counsel, or district attorney, whoever is responsible for bringing the successful action, and 25 percent of each civil and criminal penalty collected pursuant to this subdivision shall be paid to the city or county for the administration and cost of the community service work component provided in subdivision (b).

Proof that a defendant, or his or her employee or agent, demanded, was shown, and reasonably relied upon evidence of majority shall be defense to any action brought pursuant to this subdivision. Evidence of majority of a person is a facsimile of or a reasonable likeness of a document issued by a federal, state, county, or municipal government, or subdivision or agency thereof, including, but not limited to, a motor vehicle operator's license, a registration certificate issued under the Federal Selective Service Act, or an identification card issued to a member of the Armed Forces.

For purposes of this section, the person liable for selling or furnishing tobacco products to minors by a tobacco vending machine shall be the

person authorizing the installation or placement of the tobacco vending machine upon premises he or she manages or otherwise controls and under circumstances in which he or she has knowledge, or should otherwise have grounds for knowledge, that the tobacco vending machine will be utilized by minors.

(b) Every person under the age of 18 years who purchases, receives, or possesses any tobacco, cigarette, or cigarette papers, or any other preparation of tobacco, or any other instrument or paraphernalia that is designed for the smoking of tobacco, products prepared from tobacco, or any controlled substance shall, upon conviction, be punished by a fine of seventy-five dollars (\$75) or 30 hours of community service work.

(c) Every person, firm, or corporation which sells, or deals in tobacco or any preparation thereof, shall post conspicuously and keep so posted in his, her, or their place of business at each point of purchase the notice required pursuant to subdivision (b) of Section 22952 of the Business and Professions Code, and any person failing to do so shall upon conviction be punished by a fine of ten dollars (\$10) for the first offense and fifty dollars (\$50) for each succeeding violation of this provision, or by imprisonment for not more than 30 days.

(d) For purposes of determining the liability of persons, firms, or corporations controlling franchises or business operations in multiple locations for the second and subsequent violations of this section, each individual franchise or business location shall be deemed a separate entity.

(e) It is the Legislature's intent to regulate the subject matter of this section. As a result, no city, county, or city and county shall adopt any ordinance or regulation inconsistent with this section.

(f) Notwithstanding any other provision of this section, the Director of Corrections may sell or supply tobacco and tobacco products, including cigarettes and cigarette papers, to any person confined in any institution or facility under his or her jurisdiction who has attained the age of 16 years, if the parent or guardian of the person consents thereto, and may permit smoking by the person in any institution or facility. No officer or employee of the Department of Corrections shall be considered to have violated this section by any act authorized by this subdivision.

SEC. 5. Section 308.3 is added to the Penal Code, to read:

308.3. (a) A person, firm, corporation, or business may not manufacture for sale, distribute, sell, or offer to sell any cigarette, except in a package containing at least 20 cigarettes. A person, firm, corporation, or business may not manufacture for sale, distribute, sell, or offer to sell any roll-your-own tobacco, except in a package containing at least 0.60 ounces of tobacco.

(b) As used in subdivision (a), "cigarette" means any product that contains nicotine, is intended to be burned or heated under ordinary conditions of use, and consists of, or contains any of, the following:

(1) Any roll of tobacco wrapped in paper or in any substance not containing tobacco.

(2) Tobacco, in any form, that is functional in the product, that, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, is likely to be offered to, or purchased by, consumers as a cigarette.

(3) Any roll of tobacco wrapped in any substance containing tobacco which, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, is likely to be offered to, or purchased by, consumers as a cigarette described in this subdivision.

(c) Any person, firm, corporation, or business that violates this section is liable for an infraction, or in an action brought by the Attorney General, a district attorney, a county counsel, or a city attorney for a civil penalty of two hundred dollars (\$200) for the first violation, five hundred dollars (\$500) for the second violation, and one thousand dollars (\$1,000) for each subsequent act constituting a violation.

SEC. 6. No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution because the only costs that may be incurred by a local agency or school district will be incurred because this act creates a new crime or infraction, eliminates a crime or infraction, or changes the penalty for a crime or infraction, within the meaning of Section 17556 of the Government Code, or changes the definition of a crime within the meaning of Section 6 of Article XIII B of the California Constitution.

O